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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. ~~583~~ 46

EVERETT D. GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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INDEX

	Page
Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented	4
Statement	5
Summary of Argument	9
Argument	13
I-A. Appellate Review in Criminal Causes Should not Be Conditioned upon the Waiver of a Fundamental Constitutional Right	13
I-B. An Unappealed Conviction of the Lesser Included Offense of Arson bars Subsequent Prosecution for Killing Another While Perpetrating that Arson	22
II. Statements Obtained From the Accused by Police and Fire Department Inspectors Over a Two and One-half Day Period During Which the Accused was Hospitalized Under Guard Should Be Excluded Where the Accused's Detention Had Not Been Sanctioned by a Committing Magistrate, Nor Had Accused Been Advised of His Constitutional Rights	26
III. Prosecution Assurances to a Jury in a Capital Case that Theirs is Not the Final Responsibility for Finding the Facts Are Incompatible With the Standards of Fairness That Should be Maintained in a Federal Court	36
Conclusion	41
Appendix A	42
Appendix B	49

AUTHORITIES

Cases:

	Page
Ayer v. *Territory of New Mexico*, 201 Fed. 497 (8th Cir. 1912)	41
Barkman v. *Sanford*, 162 F.2d 592 (1947)	54
Bayless v. *United States*, 147 F.2d 169 (8th Cir. 1945)	54
Beecham v. *United States*, 223 U.S. 708, 709 (1911)	53
Berger v. *United States*, 295 U.S. 78 (1935)	36
Bohanan v. *State*, 18 Neb. 57 (1885)	48
Bollenbach v. *United States*, 326 U.S. 607 (1946)	41
Brock v. *North Carolina*, 344 U.S. 424 (1953),	20, 21, 48, 52
Bryan v. *United States*, 338 U. S. 552 (1950)	50
Bryan v. *United States*, 175 F.2d 223 (5th Cir. 1949)	53
Burton v. *United States*, 202 U.S. 344 (1906)	49, 50, 51
Carbonell v. *People of Porto Rico*, 27 F.2d 253 (1st. Cir. 1928	54
Carter v. *McClaughry*, 183 U.S. 365 (1902)	23
Commonwealth v. *Alessio*, 313 Pa. 537 (1934)	45
Commonwealth v. *Flax*, 331 Pa. 145 (1938)	45
Davis v. *State*, 31 Ala. App. 508 (1944)	45
Diaz v. *United States*, 223 U.S. 442 (1912)	53
Ekberg v. *United States*, 167 F.2d 380 (1st Cir. 1948)	25
Ex Parte Langè, 85 U.S. 163 (1873)	24
Ex Parte Williams, 58 N.M. 37 (1954)	45
Fitter v. *United States*, 258 Fed. 567 (2d Cir. 1919)	41
Flemister v. *United States*, 207 U.S. 372 (1907)	53
Gavieres v. *United States*, 220 U.S. 338 (1911)	23
Giles v. *United States*, 157 F.2d 588 (9th Cir. 1946)	25
Hans Nielson, Petitioner, 131 U.S. 176 (1889)	24
Hearn v. *State*, 212 Ark. 360 (1947)	46
Henderson v. *State*, 55 So.2d 110 (Fla. 1951)	45
Hurt v. *State*, 25 Miss. 378 (1853)	47
In re Bennett, 84 F. 324 (N.D. Calif. 1897)	43
In re Hess, 45 Cal. 2d 171 (1955)	46
Ippolito v. *United States*, 108 F.2d 668 (6th Cir. 1940)	40
Johnson v. *State*, 27 Fla. 245 (1891)	45
Jones v. *Mississippi*, 273 U.S. 639 (1926)	52

Page

Kepner v. *United States*, 195 U.S. 100 (1904) 16, 18
Kotteakos v. *United States*, 328 U.S. 750 (1946) 41
Kring v. *Missouri*, 107 U.S. 221 (1882) 20, 47-48
Leigh v. *Commonwealth*, 192 Va. 583 (1951) 46
Louisiana ex rel. Francis v. *Resweber*, 329 U.S. 459 (1947) 19, 48
Macomber v. *State*, 137 Neb. 882 (1940) 48
Maxwell v. *Dow*, 176 U.S. 581 (1900) 19, 48
McLeod v. *State*, 128 Fla. 35 (1937) 45
McNabb v. *United States*, 318 U.S. 332 (1943) 12, 31-35
Miller v. *United States*, 224 F.2d 561 (5th Cir. 1955) 54
Morey v. *Commonwealth*, 108 Mass. 433 (1871) 23
Morgan v. *Devine*, 237 U.S. 632 (1915) 23
Nelson v. *United States*, 93 U.S. App. D.C. 14 (1953) 36
Ocampo v. *United States*, 234 U.S. 91 (1914) 53
Opper v. *United States*, 348 U.S. 84 (1954) 32
Palko v. *Connecticut*, 302 U.S. 319 (1937) 19, 48, 52
Parker v. *State*, 22 Tex. App. 105 (1886) 46
Pendleton v. *United States*, 216 U.S. 305 (1910) 53
People v. *Carrico*, 310 Ill. 543 (1923) 45
People v. *Cignarale*, 110 N.Y. 23 (1888) 42, 47
People v. *Esposito*, 224 N.Y. 370 (1918) 39
People v. *Farrell*, 146 Mich. 264 (1906) 45
People v. *Friedt*, 280 App. Div. 836 (2d Dep't 1952) 39
People v. *Johnson*, 284 N.Y. 182 (1940) 39
People v. *Krupa*, 64 Cal. App. 2d 592 (1944) 46
People v. *McDaniels*, 137 Cal. 192 (1902) 46
People v. *McNeer*, 14 Cal. App. 2d 22 (1936) 46
People v. *Newman*, 360 Ill. 226 (1935) 45
People v. *Palmer*, 109 N.Y. 413 (1888) 47
People v. *Sherwood*, 271 N.Y. 427 (1936) 40
Pixley v. *United States*, 220 F.2d 912 (10th Cir. 1955) 35
Radej v. *State*, 152 Wisc. 503 (1913) 46
Reagan v. *State*, 155 Tenn. 397 (1927) 45
Rowley v. *Welch*, 72 U.S. App. D.C. 351 (1940) 54
Salta v. *United States*, 44 F.2d 752 (1st Cir. 1930) 54
Sapir v. *United States*, 348 U.S. 373 (1955) 50
Schaefer v. *United States*, 251 U.S. 466 (1920) 36
State v. *Ash*, 68 Wash. 194 (1912) 49

Page

State v. *Bradley*, 67 Vt. 465 (1894) 49
State v. *Coleman*, 226 Iowa 968 (1939) 46
State v. *Cooper*, 1 Green 361 (N.J. 1833) 24, 25, 45
State v. *Gilles*, 73 S.C. 318 (1906) 49
State v. *Harville*, 171 La. 256 (1930) 46
State v. *Hawley*, 229 N.C. 167 (1948) 40
State v. *Kittle*, 2 Tyler (Vt.) 471 (1803) 49
State v. *Labato*, 7 N.J. 137 (1951) 45
State v. *Lessing*, 16 Minn. 75 (1870) 45
State v. *Lewis*, 118 Fla. 910 (1931) 45
State v. *Matthews*, 142 N.C. 621 (1906) 49
State v. *McLane*, 126 W. Va. 219 (1943) 46
State v. *Mowser*, 92 N.J.L. 474 (1919) 24
State v. *Murphy*, 13 Wash. 229 (1895) 49
State v. *Noel*, 66 N.D. 676 (1936) 47
State v. *Norvell*, 2 Yerg. 24 (1820) 45
State v. *Pianfetti*, 79 Vt. 236 (1906) 49
State v. *Pruett*, 27 N.M. 576 (1921) 45
State v. *Reed*, 39 N.M. 44 (1934) 45
State v. *Rhone*, 223 Iowa 1221 (1937) 46
State v. *Ross*, 29 Mo. 32 (1859) 47
State v. *Welch*, 37 N.M. 549 (1933) 45
State v. *Wiles*, 26 Minn. 381 (1880) 45
State v. *Wilson*, 172 Ore. 373 (1943) 45
Steele v. *United States*, 222 F. 2d 628 (5th Cir. 1955) 40
Stroud v. *United States*, 251 U.S. 15 (1919) 49, 50
Stuart v. *Commonwealth*, 28 Grat. 950 (1877) 46
Taylor v. *Commonwealth*, 186 Va. 587 (1947) 46
Thomas v. *State*, 255 Ala. 632 (1951) 45
Tomlin v. *State*, 155 Tex. Cr. 207 (1950) 46
Trono v. *United States*, 199 U.S. 521 (1905), 10, 14-16, 21-22, 44, 49-55
Union Pacific R.R. v. *Field*, 137 Fed. 14 (8th Cir. 1905) 40
United States ex rel. Valenti v. *Karmuth*, 1 F. Supp. 370 (N.D.N.Y. 1932) 43
United States v. *Bozza*, 155 F.2d 592 (3d Cir. 1946) 54
United States v. *Carignan*, 342 U.S. 36 (1951) 35
United States v. *Gibert*, 25 Fed. Cas. 1287 (1834) 17, 42

Page

United States v. *Gill*, 55 F.2d 399 (D. N.M. 1931) 54
United States v. *Gonzales*, 206 Fed. 239 (W.D. Wash. 1913) 49, 55
United States v. *Keen*, 26 Fed. Cas. 686 (1839) 42
United States v. *Minker*, 350 U.S. 179 (1956) 34
United States v. *Owens*, 2 Alaska 480 (3d Div. 1905) 54
United States v. *Sanges*, 144 U.S. 310 (1892) 21
Upshaw v. *United States*, 335 U.S. 410 (1948) 34
Viereck v. *United States*, 318 U.S. 236 (1943) 40
Waller v. *State*, 104 Ga. 505 (1898) 47
Williams v. *Georgia*, 349 U.S. 375 (1955) 41

Constitutions:

U.S. Const. Amend. V 2, 14, 19, 21, 50
U.S. Const. Amend. XIV 52
Colo. Const., Art. I, § 18 48
Ga. Const., Art. I, § 2-102 47
Miss. Const., Art. III, § 22 (1890) 47
Mo. Const., Art. II, § 23 (1875) 47
Wyo. Const., Art. I, § 11 (1889) 48

Statutes:

Federal:

D.C. Code, § 22-401 (1951) 2, 5
D.C. Code, § 22-2401 (1951) 2, 5, 11, 22
D.C. Code, § 4-140 (1951) 3
50 U.S.C.A. 650 (b) 18
32 Stat. 691 14

State:

Ariz. Code Ann. 1939, § 44-2008 48
Ark. Stat. 1947, 43-2205 46
Burns' Ind. Ann. Stat. §§ 9-1901, 9-1902, (Burns' 1956 Replacement) 48
Cal. Pen. Code § 1180 46
Conn. Gen. Stat. 1949, c. 433, § 8878 48
Dart's La. Crim. Code 1943, Arts. 515, 274 46

	Page
General Code, § 13449-4	49
Idaho Code, 1947, § 19-2405	48
Iowa Code 1931, § 13945 (now Iowa Code 1946, § 787.4)	46
Kan. Rev. Gen. Stat., 1949, § 62-1602	48
Minn. Stat. Ann. § 611.10	45
Mont. Rev. Codes 1947, § 94-7602	48
Nev. Comp. Laws 1929, § 11030	49
N.Y. Code Crim. Proc., §§ 464, 543-544	47
N.D. Rev. Code 1943, § 29-2401	47
22 Okla. Stat. Ann., § 951	48
Russell's Ky. Codes 1953, Cr. Prac. § 270	48
S.D. Code 1939, § 34.4001	48
Utah Code Ann. 1953, 77-38-2	48
Va. Code Ann., § 19-222	46
Vernon's Code Crim. Prac. 1948, §§ 702, 759	46
Rules:	
Fed. R. Crim. P. 5(a) and (b)	3, 33-36
Fed. R. Crim. P. 31(c)	4, 11
Fed. R. Crim. P. 52(b)	4, 41
Miscellaneous:	
4 Blackstone's *Commentaries,* 336	15
36 Calif. L. Rev. 431 (1948)	46
Clark, *Criminal Procedure,* 452 (2d ed. 1918)	43
2 Cooley's Blackstone (3d ed. 1884)	15, 21
Cooley, *Principles of Constitutional Law,* 326 (3d ed. 1898)	21
Coudert, *Doctrine of Territorial Incorporation, 3 Selected Essays on Constitutional Law* 500, (1938)	18
Note, 19 Harv. L. Rev. 300 (1906)	44
Hoover, *Civil Liberties and Law Enforcement,* 37 Iowa L.R. 175 (1952)	35
22 L.R.A. (N.S.) 959, 961 (1909)	54
3 Wigmore, *Evidence* (3d ed. 1940)	35, 36

SUPREME COURT OF THE UNITED STATES

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UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

No opinions were written by the United States District Court for the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia Circuit following Petitioner's appeal from a conviction of second-degree murder is reported at 95 U.S. App. D.C. 45, 218 F.2d 856 (1955), and appears at R. 7. An opinion of a division of three Judges of the United States Court of Appeals for the District of Columbia Circuit on Peti

tioner's appeal from his conviction of first-degree murder dated February 9, 1956, was vacated on April 3, 1956, and withdrawn on June 28, 1956. The opinion of that court, on rehearing *en banc*, is reported at 98 U.S. App. D.C. 413, 236 F.2d 708 (1956), and appears at R. 172.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1). The judgment of the United States Court of Appeals for the District of Columbia Circuit, on rehearing *en banc*, was entered on June 28, 1956. R. 189. The petition for writ of certiorari was filed on July 27, 1956. A brief in opposition was filed by respondent on September 27, 1956. Certiorari was allowed on November 19, 1956. R. 190.

Constitutional Provisions and Statutes Involved

1. The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb."

2. Section 401 of Title 22 of the District of Columbia Code (1951) provides, in pertinent part:

> "Whoever shall maliciously burn or attempt to burn any dwelling, or house, * * * the property, in whole or in part, of another person, * * * shall suffer imprisonment for not less than one year nor more than ten years."

3. Section 2401 of Title 22 of the District of Columbia Code (1951) provides, in pertinent part:

> "Whoever, being of sound memory and discretion, * * * without purpose so to do kills another in per-

petrating or in attempting to perpetrate any arson, as defined in section 22-401, * * * of this Code, * * * is guilty of murder in the first degree."

4. Section 140 of Title 4 of the District of Columbia Code (1951) provides:

"The several members of the police force shall have power and authority to immediately arrest, without warrant, and to take into custody any person who shall commit, or threaten or attempt to commit, in the presence of such member, or within his view, any breach of the peace or offense directly prohibited by Act of Congress, or by any law or ordinance in force in the District, but such member of the police force shall immediately, and without delay, upon such arrest, convey in person such offender before the proper court, that he may be dealt with according to law."

5. Rule 5 of the Federal Rules of Criminal Procedure provides, in pertinent part:

"(a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall

also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The comissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules."

6. Rule 31(c) of the Federal Rules of Criminal Procedure provides:

"The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

7. Rule 52(b) of the Federal Rules of Criminal Procedure provides:

"Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Questions Presented

I-A. Where Petitioner's conviction of an offense unrelated to but lesser in degree than that charged in the indictment was upon review determined to be unjust, whether the divided court below properly held that Petitioner's appeal deprived him of his Constitutional right not to be put in second jeopardy for the greater offense of which he had not been found guilty at his first trial.

I-B. Whether Petitioner's unappealed conviction of the lesser included offense of arson should not have barred subsequent prosecution for killing another while perpetrating that arson.

II. Where Petitioner had been questioned in custody for

two and one-half days before he was advised of his rights and before his detention had been sanctioned by a committing magistrate, whether the majority of the court below properly held that the evil implications of secret interrogation thus raised were refuted by the fact that Petitioner was injured and in need of hospitalization.

III. Whether prosecution assurances to a jury in a capital case that theirs is not the final responsibility for finding the facts are compatible with the standards of fairness that should be maintained in a federal court.

Statement

Petitioner was first brought to trial on February 8, 1954, on an indictment in two counts. R. 2-3. The first count alleged that on or about May 26, 1953, Everett D. Green maliciously did burn, and cause to be burned, a certain building known as 1115 Massachusetts Avenue, Northwest, the property of another. This count therefore charged the offense of arson under D.C. Code, §22-401. The second count of the indictment alleged that Everett D. Green committed the offense of arson, "and in perpetrating the offense of arson aforesaid, caused Bettie Brown to inhale certain gases, the inhalation of which resulted in her death, within the District of Columbia, on or about May 26, 1953." Thus the second count charged Petitioner with the offense of first-degree murder under D.C. Code, §22-2401, in addition to the offense of arson. To this indictment the accused pled not guilty. R. 3. On February 10, 1954, the jury returned a verdict of guilty of arson on the first count and guilty of second-degree murder on the second count. R. 4. On March 19, 1954, the court adjudged the Petitioner guilty of arson and of second-degree murder and committed him to the custody of the Attorney General for imprisonment for a period of one to three years on the first count and five

to twenty years on the second count, to run concurrently with the sentence imposed on count one. R. 4-5. Since Petitioner did not appeal his conviction of arson under the first count of the indictment (R. 8, 19, 178, 187, n. 1, 2), he will have served the full term of his sentence on this count on March 18, 1957.

Petitioner did appeal from his conviction of murder in the second degree under the second count of the indictment. R. 6, 8. This conviction was reversed by the United States Court of Appeals for the District of Columbia Circuit on January 20, 1955. *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955). R. 7-13.

Once it appeared that the Government intended to prosecute Petitioner a second time on the second count of the same indictment, he moved to dismiss the indictment on the ground that he had been once in jeopardy for the offense of murder in the first degree under D.C. Code, § 22-2401. R. 15-16. This motion was filed in the United States District Court for the District of Columbia on April 8, 1955, and was argued on April 22 and 29, 1955, before The Honorable F. Dickinson Letts. Judge Letts denied the motion on April 29, 1955. R. 17. This motion was renewed on May 16, 1955, before the jury was impaneled (R. 18), and was again renewed at the conclusion of the Government's case on May 18, 1955. R. 138. The motions, as renewed, were denied. R. 18, 138.

On May 19, 1955, the second jury returned a verdict of guilty of murder in the first degree. R. 156-158. On the day following, Petitioner moved for a judgment of acquittal (in which he alleged error in the denial of his motion to dismiss the indictment) and, in the alternative, moved for a new trial. R. 158-159. These motions were denied by the court in an order entered on June 10, 1955. R. 160. The court adjudged the defendant guilty of murder in the

first degree on June 17, 1955, and imposed the mandatory sentence of punishment of death by electrocution. R. 160-161. Notice of appeal was filed on June 17, 1955. R. 162. Following a decision on February 9, 1956, by a division of three judges of the United States Court of Appeals for the District of Columbia Circuit, since vacated and withdrawn, petition for rehearing by the Court *en banc* (R. 163-171) was granted on April 3, 1956. The judgment was affirmed on June 28, 1956, by a divided court. R. 172-189.

Prior to May 26, 1953, Petitioner and a lady of 83 years, Betty Brown, shared a house at 1115 Massachusetts Avenue, Northwest. At approximately 7:30 A.M. on this date, the house was found to be on fire. R. 20. Soon after arriving at the scene, firemen discovered that both Everett D. Green and Betty Brown were in the house. Both were carried out. R. 21, 44, 108. Miss Brown was pronounced dead soon after, and Green was taken to Emergency Hospital by ambulance. R. 83.

While there was evidence that Miss Brown's blood was 14 percent saturated with carbon monoxide (R. 29), this was recognized by the chemist as a very low percentage. R. 30. And Dr. Rosenberg, the Deputy Coroner, admitted that the symptoms of from 10 to 20 percent saturation were ordinarily mild and might be absent. R. 31. The presence of carbon monoxide would indicate, however, that Miss Brown was alive at the time of the fire. R. 31. Still, the cause of her death was not clear. Dr. Rosenberg's examination disclosed that her heart was markedly degenerated and diseased (R. 28, 34); that there was a generalized arteriosclerosis (R. 28); and that this condition was a contributing factor in her death. R. 28, 35, 36. Pulmonary edema, identified as the chief cause of death (R. 35), was

shown to be a very frequent accompaniment of heart failure. R. 36. The brain was found to be congested and edematous and there were tiny hemorrhages through the brain (R. 32), a condition which would make it possible for Miss Brown to have had a stroke. R. 33. All of the organs of her body were degenerated and fibrotic. R. 34. The condition of the kidney might have caused death at any time. R. 33-34. In view of what the Deputy Coroner had found with regard to the heart and considering that a serious heart condition and a diseased kidney are very frequently found together (R. 34), there was evidence to warrant a finding that Miss Brown died from heart failure or other cause coincidentally with the fire. The jury, however, accepted the opinion of Dr. Rosenberg that the pulmonary edema was caused by the inhalation of hot gases produced by the fire. R. 36-37.

The accused, who was found unconscious in the basement of the house (R. 21, 27), suffered from smoke inhalation (R. 64) and several stab wounds on his chest and neck. R. 63. These wounds, which evidently had been inflicted by an ice pick found with blood up to the hilt (R. 132), were described as superficial by the Government's medical witness. R. 64. Police questioning began shortly after his admission to Emergency Hospital and before his wounds had been treated. R. 83, 85, 87-91, 117-118. Green was not then or at any time informed that he was not required to make statements, that any statements he did make might be used against him, or that he had a right to counsel. R. 94. The accused was questioned three different times on May 26 by police and fire department inspectors, both at Emergency Hospital and at the guarded ward of D. C. General Hospital. R. 98-104, 110-112, 118-119, 126-127, 137-138; 43-53, 68-80, 147-148. He was again questioned on May 28 (R. 78, 113-114, 130), shortly before being taken to the

Coroner's Inquisition at the D. C. Morgue. R. 64. The Coroner committed Green to the Washington Asylum and Jail to await Grand Jury action. R. 1-2.

The statements taken from Green prior to his commitment were admitted in evidence against him.

The District Attorney, in his closing argument, assured the members of the jury that the United States Court of Appeals had "a responsibility to sift the facts and look them over and decide whether this man will go to the electric chair." R. 154. *This Court*, he added, "can look these facts over and decide if this man goes to the electric chair." R. 154. And if this Court should so decide, "there is the President of the United States who may look these facts over" (R. 154), and "there is the Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence." R. 154. The District Attorney concluded that "the consequences or the result of your verdict is something that you are not concerned with or should be concerned with." R. 155.

Summary of Argument

I

Petitioner was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second count," Green appealed "only from the latter." *Green v. United States*, 95 U.S. App. D.C. 45, 218 F. 2d 856 (1955). The United States Court of Appeals for the District of Columbia Circuit agreed that there was no evidence in the record of murder in the second degree and that the trial judge erred to Green's prejudice in submitting the question of second-degree murder to the jury.

Petitioner's objections, on grounds of former jeopardy, to his retrial on the higher charge defined in the original indictment were overruled by the trial court. Found guilty, he was sentenced to death.

The divided court below, on rehearing *en banc*, held that Petitioner's appeal of the erroneous conviction of second-degree murder, a conviction of an offense unrelated to that charged in the indictment and without foundation in the evidence, presumptively waived the Constitutional bar against retrial for felony murder. It thus upheld the mandatory sentence of death imposed by the trial court following his second trial.

The common law, evidenced by the overwhelming weight of American decided cases, did not attach such conditions to the exercise of the right of an accused to seek appellate review of a conviction which he regarded as unjust. Thus, while permitting a new trial for the offense of which the accused was convicted, the appellant was not presumed to have waived his defense of former jeopardy against retrial for a greater offense for which he had been tried and not convicted.

In abrogating the common law rule and holding that one who appeals his conviction of a lesser but unrelated offense is "manifestly taking a desperate chance," the majority of the court below mistakenly regarded an opinion of four justices of this Court (with whose result in that particular case Mr. Justice Holmes concurred) in *Trono* v. *United States*, 199 U.S. 521 (1905), as determinative of the question presented in the instant case.

For Trono was tried in the Philippine Islands where, under the residue of Spanish criminal procedure, the appellate court was empowered to substitute its own findings of fact for those of a trial magistrate. Petitioner, on the other hand, was tried in a Federal court before a jury.

Moreover, Trono appealed from his conviction of an offense necessarily included in the offense charged. Petitioner, on the other hand, did not appeal his conviction of the only necessarily included offense of arson, which still stands, but only appealed his conviction of an offense which, under the applicable District of Columbia statute, was not covered in his indictment.

While the offense of second-degree murder is not one necessarily included in the District of Columbia felony murder statute, D.C. Code, § 22-2401, it is obvious, both from the statute and from the indictment in the instant case, that the felony enumerated in the statute is. Rule 31(c) of the Federal Rules of Criminal Procedure provides that "the defendant may be found guilty of an offense necessarily included in the offense charged." Such was the offense of arson in the instant case. Unlike Trono, who appealed the whole judgment against him, Petitioner did not appeal the portion of the judgment convicting him of arson and has served his sentence thereon. It was accepted at common law that an unappealed conviction of such a lesser-included offense bars subsequent prosecution for the greater.

Thus, whether regarded as a plea of *autrefois acquit* or one of *autrefois convict*, Green's timely motion to dismiss the indictment following reversal of his second-degree conviction should have been granted.

II

Petitioner was taken from a burning house, unconscious and suffering from numerous ice pick wounds in his chest and neck. Within an hour, and before his wounds had been treated, he was questioned by a detective attached to the Homicide Squad. He was interrogated a second time by police on the same morning and a third time by inspectors of the Fire Department after his removal to the "strong

room" at the District of Columbia General Hospital that afternoon. He was again interrogated by officers of both departments shortly before his arraignment; nearly two and one-half days later. It appears that at no time was the defendant advised that he was not required to make a statement, that any statement made by him might be used against him, or that he had a right to counsel. Isolated from contact with friends or counsel, Petitioner made numerous statements which, when introduced at his trial, constituted an affirmative and vital part of the Government's case against him. The majority below refused to apply the exclusionary rule of evidence formulated by this Court in *McNabb* v. *United States*, 318 U.S. 332 (1943), on the ground that "delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention." R. 181. The instant case presents the question whether police are to be permitted to exploit the circumstances attending a suspect's need for hospitalization by keeping him behind bars and engaging in prolonged and secret interrogation without advising him of his Constitutional and other rights.

III

Allegedly, either in desperation or completely inadvertently, Petitioner caused the death of an elderly woman who had been his only friend and companion for years. Since she was an invalid, the accused nursed and provided for her and celebrated her birthdays with jello and pound cake. R. 79-80. When, believing her dead, he contemplated suicide, he enclosed the last of his money for flowers for her funeral. R. 180. The District Attorney, recognizing that it would be impossible to persuade any member of the jury that the defendant was a blackguard, appealed for a conviction by informing the jury that they should not be concerned with the consequences of their verdict. R. 155. He

assured them in his closing argument that the United States Court of Appeals had a responsibility to sift the facts and look them over and decide whether the sentence of death (mandatory in the District of Columbia) was to be imposed; that the Supreme Court of the United States, if it saw fit, could look the facts over and decide if the defendant was to go to the electric chair; that the President of the United States might look the facts over and commute the sentence, and finally that the Attorney General might make recommendations to the President relative to the sentence.

These remarks and others were far removed from the minimum standards of fairness required of prosecuting attorneys in the Federal courts, and were grossly prejudicial to the accused.

ARGUMENT

I. Appellate Review in Criminal Cases Should Not Be Conditioned upon the Waiver of a Fundamental Constitional Right.

Petitioner was tried upon an indictment charging, in two counts, arson and killing another while perpetrating that arson. "Found guilty of arson under the first count and of murder in the second degree under the second count," Green appealed "only from the latter." *Green* v. *United States*, 95 U.S. App. D.C. 45, 218 F.2d 856 (1955). R. 8. The United States Court of Appeals for the District of Columbia Circuit agreed with Green that there was no evidence in the record of murder in the second degree and that the trial judge erred to Green's prejudice in submitting the question of second degree murder to the jury [1] since, "had the erroneous instruction under which he was convicted not been given, Green might have been found not

[1] "Whether it was error to give that instruction depends on whether there was evidence to justify it; . . ." R. 8. The instruction on felony murder given at the first trial was correct.

guilty under the second count." *Green* v. *United States*, *supra*, at R. 12.

Petitioner's objections, on grounds of former jeopardy, to his retrial on the higher charge defined in the original indictment were overruled by the trial court. (R. 15-17, 18, 138, 158, 160. Found guilty, he was sentenced to death. R. 157-158, 160-161.

The divided court below, on rehearing *en banc*, held that Petitioner's appeal of the erroneous conviction of second-degree murder, a conviction unrelated to the indictment or the evidence, deprived him of the protection he would otherwise have been afforded by the Fifth Amendment, which provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

In affirming Petitioner's conviction of first-degree murder following reversal of his conviction of the lesser, but unrelated degree of murder, the majority of the court below relied upon an opinion of four justices of this Court over fifty years ago. *Trono* v. *United States*, 199 U.S. 521 (1905). This Court was there presented with the question whether the Audiencia (the highest court in the Philippines), in reversing the trial magistrate's finding of guilty of assault and substituting its own finding of guilty of homicide, violated Section 5 of an act for the government of the Philippine Islands, 32 Stat. 691. Under that act both assault and homicide were lesser offenses included in the offense of murder. 199 U.S. at 522. The four justices of this Court, with whose result Mr. Justice Holmes concurred, said that one who appeals "thereby waives, if successful, his right to avail himself of the former acquittal of the greater offense, contained in the judgment which he has himself procured to be reversed." 199 U.S. at 533.

Five of the nine judges below thought that the *Trono* doctrine should be extended to a case arising within the

territorial limits of the United States, and regarded it as determinative of the defendant's appeal. R. 172. One judge below concurred solely because he saw "no escape in this case from the law there laid down." R. 182. Three judges of the court below thought that they "should apply the prevailing rule at common law which would have precluded his second trial for the greater offense of which he had been acquitted." R. 188.

The common law, evidenced by the overwhelming weight of American decided cases,[2] does not put a price tag on the exercise of the right to appeal. Thus, in our time, as in Blackstone's,[3] retrial following successful recourse to the appellate courts is limited to that offense of which the accused had been previously convicted. The reason for this, as stated by the minority of this Court in *Trono* v. *United States, supra*, at 538-539, is that it is absolutely unrealistic to suppose that the defendant did purposely and consciously

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[2] A total of twenty-three state courts agree that a new trial, in the absence of statute or constitutional provision declaring the effect of the judgment's reversal, must be restricted to a retrial of the charge upon which the accused was convicted, or one of lesser degree. Opposed to this interpretation of the common law rule forbidding second jeopardy for the same offense are decisions in only eight states, two of which found it expedient to overrule earlier cases which expounded the limited waiver doctrine. Eleven of the remaining state courts found that the decision had already been made for them by the state legislature or constitutional convention. So far as research discloses, the problem has not arisen in six states. See Appendix A.

[3] "If the prisoner is convicted on one count of an indictment and acquitted on another, and then obtains a new trial, he is only tried afterwards on the count on which he was before convicted." 2 Cooley's *Blackstone* 498, n. 15 (3d Ed. 1884).

"And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held, that a conviction of manslaughter, on an appeal or an indictment, is a bar even in another appeal, and much more in an indictment of murder, for the fact prosecuted is the same in both, though the offenses differ in colouring and in degree." 4 Blackstone's *Commentaries* * 336.

waive his right to avail himself of an acquittal of the greater offense of which he was not found guilty:

> "The life and liberty of the citizen are precious things—precious to the State as to the citizen, and concern for them is entirely consistent with a firm administration of criminal justice. I submit that the State seeks no convictions except in legal ways, and because it does not it affords means of review of erroneous rulings and judgments, and freely affords such means. It does not clog them with conditions or forfeit by their exercise great and constitutional rights. Yet in my judgment such is the effect of the decision just rendered.
>
> "The opinion says that as the accused takes up the whole record for review, 'he thereby waives the benefit of the provisions in question (once in jeopardy) for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher courts of the judgment of conviction.' I repeat again, that constitutional guarantees and statutory remedies should not be put in such barter; that a defendant should not be required to give up the protection of a just (it must be so regarded for the sake of the argument) acquittal of one crime as the price of obtaining a review of an unjust conviction of another crime."

While Mr. Justice Holmes concurred in the result reached by the Court in *Trono*, it may be noted that he had no sympathy for the waiver theory advanced by Mr. Justice Peckham. Thus, dissenting the year before in *Kepner* v. *United States*, 195 U.S. 100 (1904), Mr. Justice Holmes said at page 135:

"It cannot matter that the prisoner procures the second trial. In a capital case, like *Hopt* v. *People*, a man cannot waive, and certainly will not be taken to waive without meaning it, fundamental constitutional rights. *Thompson* v. *Utah*, 170 U.S. 343, 353, 354. Usually no such waiver is expressed or thought of. *Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error, unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.*" (Emphasis added.)

It is true that a successful appellant may be retried for the offense of which he was previously convicted. This exception to the Constitutional prohibition against second jeopardy was formulated so as to give effect to the intention and best interests of the accused, who at one time was said to have no right of appeal whatsoever since any further proceedings following reversal of his conviction would place him twice in jeopardy. See *United States* v. *Gibert*, 25 Fed. Cas. 1287, No. 15, 204 (1834). No such rea[illegible] exists for extending the scope of the waiver to the situation presented here. Our system of justice is such that taking an appeal should not be "manifestly taking a desperate chance," as five judges of the court below described Green's effort to obtain review and reversal of his conviction of the lesser, but unrelated, offense. See *Green* v. *United States*, *supra*, at R. 173.[4]

The action of the court below is without precedent. Not only is it the first time that a Court of Appeals has extended

[4] While it is true that petitioner's counsel was questioned at the first appeal as to whether petitioner understood the possible consequences of a successful appeal, and while it is true that petitioner did understand the possible consequences, his counsel then suggested to the Court that any effort to retry petitioner upon the same indictment would raise a problem of double jeopardy. R. 164, 169.

the *Trono* decision to a case arising in a Federal court in the United States, but it is the first time that any Federal court has attached *Trono* consequences to the appeal of a conviction unrelated to the offense originally charged and tried. In so doing the court below has gone farther than this or any other Federal court. See Appendix B.[5]

The three judges of the court below who dissented found the *Trono* decision sufficiently distinguished from the instant case by the fact that it arose in the Philippines "under procedures which permitted the whole case to be reviewed and tried *de novo* in the appellate court." R. 187.[6]

There was no tradition of a common law jury in the Philippine Islands. Appellate courts had few reservations about substituting their findings of fact for those of the trial magistrate. Indeed, that a trial magistrate might have the power finally to acquit a notorious criminal was unthinkable to Mr. Justice Brown, who cast a deciding vote in *Trono*. This is evident from his dissent the year before in *Kepner v. United States*, 195 U.S. 100, 137 (1904):

> By that law, in which trial by jury was unknown, the jeopardy did not terminate, if appeal were taken to the

[5] This includes the military. Article 63(b) of the Uniform Code of Military Justice, 50 U.S.C.A. § 650(b), provides that upon rehearing before a court-martial "the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed. . . ." To apply *Trono* in the instant case would deny a civilian tried in a Federal district court the protection he would have were he a soldier before a court-martial.

[6] Challenging the proposition that the Constitution followed the flag, an eminent authority has thus described the degree to which Constitutional restrictions were made applicable to insular governments:

> "The doctrine has been sufficiently elastic to permit of a government which, while maintaining the essentials of modern civil liberty, has not attempted to impose upon the new peoples certain ancient Anglo-Saxon institutions for which their history had not adapted them." Coudert, *Doctrine of Territorial Incorporation*, 3 *Selected Essays on Constitutional Law* 500, 526 (1938).

> audiencia or Supreme Court, until that body had acted upon the case. The proceedings before the court of first instance were in all important cases reviewable by the Supreme Court upon appeal. . . . It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals."

Had not Mr. Justice Brown so distrusted the integrity of the findings of fact of a Philippine trial magistrate, sitting without a jury, the decision in *Trono* would have been different, and the majority of the court below would not have felt constrained to strike from the Fifth Amendment one of the common law safeguards of individual rights there embodied. There is no question that the draftsmen of the Bill of Rights intended to preserve the power of a common law jury in the United States finally to acquit. *Palko* v. *Connecticut*, 302 U.S. 319 (1937).

The restrictions *in favorem libertatis* imposed on the Federal courts by the Bill of Rights were not made wholly applicable to state governments. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *La. ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947).

> "The judicial history of the Fifth Amendment in prohibiting any person from being 'subject for the same offence to be twice put in jeopardy of lime or limb' serves as a good pragmatic confirmation of the compelling reasons why the original Bill of Rights was found to limit the actions of the Federal Government and not those of the States. The conflicting views expressed in *Ex parte Lange*, 18 Wall. 163; *Kepner* v. *United States*, 195 U.S. 100; *Trono* v. *United States*,

This would appear to be the general practice. See *Proceedings, International Association of Chiefs of Police*, 54 (1910), quoted in 3 Wigmore, *Evidence* 316-317 (3d ed. 1940).

It is difficult to find a conscious and intelligent waiver of the Constitutional privilege to refrain from incriminating oneself where the accused is surrounded by police, isolated from contact with friends or counsel, and ignorant of the purpose of the questioning to which he is subjected. Even if the police cannot, because of the physical condition of the accused, or for other legitimate reason, bring him before a committing magistrate "without unnecessary delay" under Rule 5(a), this does not excuse police disregard of the legislative command in Rule 5(b) that a person under arrest be advised of his Constitutional rights and his right to counsel, rights which have been aptly described as "guides to the exercise of free will." *Cf. Nelson* v. *United States*, 93 U.S. App. D.C. 14, 21, n. 19, 208 F.2d 505, 512, n. 19, *cert. denied*, 346 U.S. 827 (1953).

III. Prosecution Assurances to a Jury in a Capital Case That Theirs Is Not the Final Responsibility for Finding the Facts Are Incompatible With the Standards of Fairness That Should Be Maintained in a Federal Court.

While this Court has declared that the jury "alone is charged with the consideration and decision of the facts of a case," *Schaefer* v. *United States*, 251 U.S. 466, 476 (1920), and while this Court has reversed a conviction to rebuke a prosecuting attorney who "overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer," *Berger* v. *United States*, 295 U.S. 78, 84 (1935), the instant case presents the question whether a prosecutor's appeal to a jury mini-

199 U.S. 521; *In re Bradley*, 318 U.S. 50, and *Wade* v. *Hunter*, 336 U.S. 684, indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of fair dealing and justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. . . ." *Brock* v. *North Carolina*, 344 U.S. 424, 428-429 (1953).

Thus there can be no Constitutional objection if a state, "either by her fundamental law or by an ordinary act of legislation," modifies the common law rule by providing that a new trial places the parties in the same position as if no trial had been had. *Kring* v. *Missouri*, 107 U.S. 221, 225 (1882). This change in the law, however, was recognized as a change in substance so that it could not be applied retroactively. This Court held that the State of Missouri could not prosecute a first-degree murder charge on retrial against one who had previously been convicted of second-degree murder where Missouri abolished the limited waiver doctrine after the commission of the crime. This Court said at 107 U.S. 234-235:

> "The case rests, then, upon the proposition that, having an erroneous sentence rendered against him on the plea accepted by the court, he could only take the steps which the law allowed him to reverse that sentence at the hazard of subjecting himself to the punishment of death for another and a different offence of which he stood acquitted by the judgment of that court.
>
> "That he prosecuted his legal right to a review of that sentence with a halter around his neck, when, if he succeeded in reversing it, the same court could

mizing their responsibility and misrepresenting that of the the appellate courts is not grossly prejudicial to the accused in a capital case.

Petitioner submits that the prosecutor's argument to the jury at the conclusion of his trial was so far removed from the minimum standards of "propriety and fairness" as to require a new trial. The District Attorney presented his appeal for a conviction in this way (R. 154):

> "Now if you should find this defendant guilty, the responsibility as to the consequences of your verdict falls to someone else. It is not you. You don't have to come down here at sometime later or even today or tomorrow, whenever you bring your verdict back, and say, well, now, you go to the electric chair. That is not your function. That is His Honor's function.
>
> "And it doesn't end there. There is the United States Court of Appeals.
>
> "They have a responsibility to *sift the facts* and *look them over* and *decide whether this man will go to the electric chair.* (Emphasis added.)
>
> "There is the Supreme Court of the United States. If they see fit, they can *look these facts over* and *decide if this man goes to the electric chair.* (Emphasis added.)
>
> "There is the President of the United States, who may look these facts over, and as you well know, often these sentences are commuted to something less than death in the electric chair.
>
> "There is the Attorney General of the United States, who may make recommendations to the President of the United States relative to this sentence.

tighten it to strangulation, and if he failed, it did him no good.

And this is precisely what has occurred. His reward for proving the sentence of the court of twenty-five years' imprisonment (not its judgment on his guilt) to be erroneous, is that he is now to be hanged instead of imprisoned in the penitentiary. No such result could follow a writ of error before, and as to this effect the new constitution is clearly *ex post facto.*"

Since the technical niceties of common law double jeopardy were imposed on the Federal courts by the Bill of Rights, *Brock* v. *North Carolina,* supra, at 428-429, and under that common law an acquittal was final,[7] it follows that the presumption of absolute waiver cannot be reconciled with the Fifth Amendment to the Constitution of the United States, which, unlike the Missouri constitution, has not been modified by subsequent amendment.

Although the *Trono* case arose in a legal system where an appellate court was free to substitute its judgment for the trial court's findings of fact, and although no more than four of the then justices of this Court felt able to join in the absolute waiver doctrine, six of the nine judges below felt obliged by it to decide adversely a Constitutional question which immediately involves the life or death of Petitioner

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[7] Holding that the doctrine of former jeopardy required that the United States have no right to appeal in a criminal case, the Supreme Court set out the following as the rationale:

"The common law maxim, and the Constitution are founded in the humanity of the law, and in a jealous watchfulness over the rights of the citizen, when brought in unequal contest with the State." *United States* v. *Sanges,* 144 U.S. 310, 315 (1892).

See also 2 Cooley's *Blackstone* 391 n. 3:

"An acquittal, even though against the weight of the evidence, is final. In the absence of statutory permission no new trial is granted the prosecution." Accord, Cooley, *Principles of Constitutional Law* 326 (3d ed. 1898).

and which substantially affects the right hereafter to appeal in the Federal courts of the United States.

If the opinion below is allowed to stand, not only will Petitioner be executed in consequence of having had the temerity to appeal an unsubstantiated conviction of an offense unrelated to that originally charged, but every accused hereafter convicted in the Federal courts of an offense differing from that for which he was indicted and tried, no matter how unjustly so convicted, will be required to make a choice between acquiescing in that unjust conviction or throwing aside the protection afforded him by the second jeopardy clause of the Constitution and incurring the hazards of a new trial without the benefit of his previous acquittal.

The decision below, which attaches conditions to the right of appeal which are both unwarranted by the Constitution and unfair, should be reversed by this Court.

I-B. An Unappealed Conviction of the Lesser Included Offense of Arson Bars Subsequent Prosecution for Killing Another While Perpetrating That Arson.

In addition to disregarding the actual acquittal at the defendant's first trial resulting from the failure of the jury to return a verdict of guilty on the first degree charge, the application by the court below of the *Trono* decision to the present case violated a second common law safeguard of the defendant's. This was the refusal of the court below to accept the implied acquittal resulting from the defendant's unappealed conviction of arson. In so doing the majority pronounced a rule which means that conviction of a lesser included offense can never bar a subsequent prosecution for the greater. R. 177-178.

When the indictment charges a killing in the perpetration of one of the felonies enumerated in D. C. Code, § 22-2401

> "Now I mention that, ladies and gentlemen, because I want to emphasize to you that it is the responsibility of those people, the Judge, the Court of Appeals, the Supreme Court, if they should decide to hear the case, the President of the United States, if it should come to his attention. It is the responsibility of those people to decide whether this man goes to the electric chair. It is not yours, ladies and gentlemen. I want to emphasize that because I consider it important that your function be defined by me to you."

These sentiments are again echoed by the District Attorney in the closing paragraphs of his remarks to the jury (R. 155):

> "The consequences or the result of your verdict is something that you are not concerned with or should be concerned with.
>
> "As I say, there is the Judge in this case, the Court of Appeals, the Supreme Court, the President, the Attorney General, and I am sure this man's rights will be protected all the way along the line. It is the responsibility of these other people to decide what to do with this man and not you, and I am sure his rights will be protected all along the line."

Patently, this dissertation upon the responsibility of the reviewing courts to look over the facts in this case and decide Petitioner's fate was not intended to benefit the accused. By attributing nonexistent powers and responsibilities to the appellate courts and by assuring the jury that his superior, the Attorney General, could recommend executive clemency, the District Attorney in effect suggested to the jury that "no ultimate harm could come to defendant if

"they should through error or intention relax somewhat in the application of those principles which ought to govern their deliberations in his favor. . . ." *People* v. *Esposito*, 224 N.Y. 370, 376, 121 N.E. 344, 346 (1918). See, *e.g.*, *People* v. *Friedt*, 280 App. Div. 836, 113 N.Y.S. 2d 889 (2d Dep't. 1952); *People* v. *Johnson*, 284 N.Y. 182, 187-188, 30 N.E.2d 465, 467 (1940). Indeed, by the time the court reporter had transcribed page 154 of the Record, the members of the jury must have wondered why they were there at all.

We recognize that the circumstances of the killing charged in this case would not be regarded as encouraging by an ambitious prosecuting attorney. Green was sixty-five years old. Allegedly, either in desperation or completely inadvertently, he caused the death of an elderly woman who had been his only friend and companion for years. A jury is naturally reluctant to return a verdict of guilty of first-degree murder where the accused has nursed the victim, celebrated her birthdays, and provided the last of his money for flowers for her funeral. R. 79-80. The circumstances of the case were such that the District Attorney felt compelled to ask the Court to instruct the jury that considerations of mercy and sympathy were immaterial. Tr. 642.

In New York, a 27-year-old widow was tried for drowning her two-year-old son. This was first-degree murder for which the penalty, as in the instant case, was death. Jobless, deceived by the man who had promised to marry her, and afterwards evicted from her rooming house, she decided that she could no longer care for the child and that "he would be better off dead." In closing argument, the jury was told that the Governor could commute the death sentence, should she be found guilty. The trial judge, in answer to a question of the foreman of the jury, said that the law permitted the jury to recommend mercy. The Court of Appeals of New York held that these remarks constituted

(1951), and there is no evidence of an act of killing independent of the felony, that felony is the only lesser included offense.

The defendant never sought review of his arson conviction at his first trial. R. 8, 187, n. 1, 2. The arson conviction was not set aside in his first appeal. R. 19, 178. He is advised by prison authorities that the full term expiration date of his sentence on the arson conviction is March 18, 1957.

In ignoring the bar raised by this conviction, the court below did violence to the normal test of what constitutes a lesser included offense, and in fact disowned the very reasoning it purported to respect.

The court below found that the test of what constituted a lesser-included offense was that set forth by the Supreme Judicial Court of Massachusetts in *Morey* v. *Commonwealth*, 108 Mass. 433 (1871). R. 177. As stated by that Court,

> "*if each statute* requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (Emphasis supplied).[8]

Ostensibly respecting this test, the court below upheld the later prosecution because "evidence sufficient for conviction under the first charge would not have convicted under the second indictment." R. 178. If this is held to be

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[8] The cases cited in support of this test are all examples of separate statutory offenses, each of which required proof of a separate act and a separate intent not required in the other—*Carter* v. *McClaughry*, 183 U.S. 365 (1902) (conspiracy to defraud & causing false and fraudulent claims to be made); *Gavieres* v. *United States*, 220 U.S. 338 (1911) (indecent behaviour in public & insulting and threatening a public official); *Morgan* v. *Devine*, 237 U.S. 632 (1915) (breaking and entering & larceny).

a correct statement of the law, no conviction of a lesser included offense will ever bar prosecution on the greater since, by definition, the lesser will always lack one element of proof required for conviction of the greater.

Under the *Morey* rule the defendant was clearly exempt from a second prosecution for killing another in the perpetration of an act of arson because every element of the arson had to be proved before he could be guilty of the killing while perpetrating arson. Here, rather than "each statute", only one required proof of an additional fact. That one defined the greater offense.

The proposition that an unappealed arson conviction would bar a subsequent prosecution for a killing arising out of that arson was accepted at common law. *State* v. *Cooper*, 1 Green 361, 25 Am. Dec. 490 (N.J. 1833); see *State* v. *Mowser*, 92 N.J.L. 474, 106 Atl. 416 (1919) (robbery conviction barred prosecution for felony murder). Cooper, convicted upon an indictment charging arson, successfully moved to dismiss a subsequent effort to prosecute him upon another indictment charging a consequent killing.[9] The rule in *State* v. *Cooper, supra*, which was indirectly relied on in the *Morey* case, has been cited with approval by this Court in several of the leading double jeopardy cases. See, *e.g.*, *Hans Nielson, Petitioner*, 131 U.S. 176, 190 (1889); *Ex Parte Lange*, 85 U.S. 163 (1873) at 170:

> "If in civil cases, says Drake, J., in *State* v. *Cooper*, the law abhors a multiplicity of suits, it is yet more watchful in criminal cases that the crown shall not oppress

[9] In *State* v. *Cooper, supra*, the charge of killing in perpetrating the arson was never submitted to the jury. Yet the conviction of arson barred further prosecution on the consequent killing. In the instant case the charge of killing while prepetrating arson was submitted to the first jury, and the jury, after deliberation, did not find the defendant guilty thereof but guilty of the lesser included offense of arson. The instant case is a stronger acquittal.

seriously prejudicial error. *People* v. *Sherwood*, 271 N.Y. 427, 435, 3 N.E.2d 581, 584 (1936):

> "Coming as it did, it amounted to nothing less than an invitation to possible doubting minds and uneasy consciences, to solve their doubts against the defendant, and to salve their consciences with the thought that, if they were wrong, executive grace might cure the error.
>
> * * * * *
>
> "Under the law of this state the penalty for murder in the first degree is death. No power or discretion is vested in any judge or court to vary it.
>
> * * * * *
>
> "The error almost certainly was prejudicial to the defendant."

In the instant case, the District Attorney's assurance that "the responsibility as to the consequences of your verdict falls to someone else" (R. 154), was no less prejudicial.

It is the duty of the trial court to interrupt the District Attorney on its own initiative when improper remarks are made to the jury. *Viereck* v. *United States*, 318 U.S. 236, 248 (1943); *Steele* v. *United States*, 222 F.2d 628, 631 (5th Cir. 1955); *State* v. *Hawley*, 229 N.C. 167, 48 S.E.2d 35 (1948); *see Ippolito* v. *United States*, 108 F.2d 668, 671 (6th Cir. 1940). If neither rebuke nor full instructions can remove the harmful effects of the remarks from the minds of the jury, see *State* v. *Hawley*, *supra*, the trial judge should discharge the jury and declare a mistrial. *Cf. Union Pacific R.R.* v. *Field*, 137 Fed. 14, 16 (8th Cir. 1905). "And where this duty has not been performed it is the plain duty

of the appellate court to set aside the judgment unless it is convinced that no possible harm has resulted." *See Fitter* v. *United States*, 258 Fed. 567, 572 (2d Cir. 1919).[11]

Conclusion

For the reasons stated above, the decision below should be reversed and the cause remanded to the court below with appropriate instructions.

Respectfully submitted,

GEORGE BLOW,
GEORGE RUBLEE, II,
CHARLES E. FORD,
Counsel for Petitioner by Appointment in the Courts Below.

MARCH, 1957.

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[11] "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). That life is at stake is an important factor in recognizing error where no objection is made. *See Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). There is a presumption in law that prejudice results from error, *Ayer* v. *Territory of New Mexico*, 201 Fed. 497, 498 (8th Cir. 1912), and the possible persuasion of the appellate court of the guilt of the petitioner is not sufficient to rebut this presumption. *See Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946); *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946).

> the subject, or the government the citizen, by unreasonable prosecutions."

The law is not so illogical as the opinion below would make it seem. Conviction of the lesser included offense has been held to bar later prosecution for the greater, and the courts so holding have relied on the *Morey* test. Unlike the court below, however, they have interpreted it properly. *See, e.g., Ekberg* v. *United States*, 167 F.2d 380, 386 (1st Cir. 1948); *Giles* v. *United States*, 157 F. 2d 588, 590 (9th Cir. 1946), *cert. denied*, 331 U.S. 813 (1947).

Normally, in order to prove murder, one need not prove arson. This was not true in the instant case where the indictment charged that the defendant, in perpetrating arson, caused the deceased to inhale certain gases, the inhalation of which resulted in her death, Unless the defendant were guilty of arson, he could not be guilty of the killing charged. The multiple nature of the prosecutions here is demonstrated by the fact that at the defendant's second trial it was necessary for the Government to show again that he was guilty of arson—the same offense of which he had been found guilty a year before and had not appealed—and that deceased died from inhaling gases produced by that same fire.

The decision in *State* v. *Cooper, supra*, which is directly in point, and which has been cited with approval by this Court, is completely consistent with the test adopted by the court below, and should be determinative of the question presented.

II. Statements Obtained From the Accused by Police and Fire Department Inspectors Over a Two and One-Half Day Period During Which the Accused Was Hospitalized Under Guard Should Be Excluded Where the Accused's Detention Had Not Been Sanctioned by a Committing Magistrate, Nor Had Accused Been Advised of His Constitutional Rights.

A Supreme Court rule intended to preclude the *opportunity* for police interrogation of a suspect before he has been brought before a committing magistrate and advised of his right to counsel and his right not to make statements which might later be used against him is substantially weakened by the opinion of the majority of the court below, which holds that assertions about the prearraignment questioning of the accused, heavily relied upon in the prosecution's presentation of the case, were admissible, *not in spite of, but because of* the fact that the accused required medical treatment. R. 181.

On May 26, 1953, at about 7:40 in the forenoon, Petitioner was discovered unconscious in the basement of a burning house. R. 21, 27. He was lying face down in two or three inches of water. R. 24. The front of his shirt was covered with blood (R. 24-25), and there was blood on his neck. R. 27. Firemen carried Green out to the lawn (R. 24, 27), where he was given oxygen and afterwards taken to Emergency Hospital. His interrogation began within an hour.

May 26, 1953

Between 8:30 and 9:00 A. M.

Sergeant Lionel Couture, Homicide Squad, Metropolitan Police Department, arrived at Emergency Hospital either between 8:30 and 8:45 A. M. (R. 83, 85), or between 8:45

APPENDIX A

AT COMMON LAW A SUCCESSFUL APPELLANT COULD BE RETRIED ONLY FOR THE OFFENSE EMBODIED IN THE CONVICTION APPEALED.

While the appeal in the present case was from a conviction of an offense lesser in degree but unrelated to the offense charged in the indictment and sought to be proved at the trial, and the common law cases discussed in this appendix deal with appeals from convictions of lesser offenses included in the greater charged in the indictment, nonetheless the common law doctrine, which limited refrial to the offense embodied in the conviction appealed, is relevant to the present situation.

The common law was reluctant initially to allow any waiver of jeopardy. *United States* v. *Gibert*, 25 Fed. Cas. 1287, No. 15,204 (1834). "In other words, the constitution guarantees to him the right of being hung to protect him from the danger of a second trial." *United States* v. *Keen*, 26 Fed. Cas. 686, 690, No. 15,510 (1839). The absurdity of refusing a new trial on constitutional grounds led to a grudging recognition that the defendant should be permitted to waive jeopardy with respect to the offense of which he had been convicted. Thus in *United States* v. *Keen*, *supra*, the court concluded at 689:

> "It surely does not follow that if the court may grant a new trial in a capital case, with the assent and on motion of the prisoner, on a verdict of guilty that they may do the same thing on a verdict of acquittal, and against the consent and remonstrance of the defendant."

The waiver was not extended beyond the prisoner's needs. Thus, when a conviction of a lesser included offense was appealed, the common law refused to extend the waiver of jeopardy to the greater offense on which the appellant had been tried and not convicted. This is substantiated by the common law rationale set out in *People* v. *Cignarale*, 110 N.Y. 23, 30-31, 17 N.E. 135, 142-143 (1888):

and 9:00 A. M. R. 108. He found Green lying on his back on an examining table. R. 90. Couture observed that he had two wounds on his neck and several marks on his chest. "They were bleeding a little, but they didn't seem to be too bad, I don't know." R. 87. It appears that the wounds had not been treated. R. 89-91, 117-118. Couture asked no one whether Green was in condition to be questioned. R. 118. While Couture did inform Green that he was from the Homicide Squad (R. 92-93), he did not then or at any time inform Green that any answers he gave might be used against him or that he had other rights. R. 94. At the conclusion of the interview, Couture telephoned the Third Precinct and requested them to send a policeman to the Hospital "to take charge of this gentleman until we return or until I return to the Hospital." R. 84, 107.

10:00 A. M.

Sergeant Couture, joined by Sergeant Alfred Clarke, returned to Emergency Hospital. Green had not been moved. R. 98, 103, 111. As to whether Green was in custody at that time, Sergeant Couture said, in response to a question by the court: "There were no officers there, no sir, just myself and Sergeant Clarke." R. 98. Although Couture could not recall whether any of Green's wounds had been treated by that time (R. 104, 119), Sergeant Clarke testified that there was a patch taped on his chest. R. 126, 138. It appears that Green was given neither water nor food while at Emergency Hospital. R. 59.

Questioning by Sergeants Couture and Clarke developed that Green had been to see a number of people in an effort to borrow several hundred dollars to forestall his eviction from the house. R. 127. Sergeant Clarke testified that Green first told him that he came down the front staircase of the house around 7:00 A. M. and that, on further ques-

"But in this state, and generally elsewhere, a party convicted is permitted, in some form, to have a review for the purpose of correcting any errors of fact or law which may have been committed on the trial; and it became a settled qualification of the doctrine that a party could not be twice tried for the same offense, that, by seeking and obtaining a new trial for error, he thereby waived the constitutional protection, and could be again tried for the offense of which he formerly was convicted. *U.S.* v. *Keen*, 1 *McLean*, 435; *People* v. *Dowling*, supra. *But this doctrine*, in turn, *was limited* so as *to protect a defendant who secured a reversal and new trial from being again put on trial* for a higher grade of the same offense, or *for another offense included in the same indictment*, of which higher grade, or of which other offense, the first conviction was by inference an acquittal. So it was held that a verdict of conviction of one of several offenses charged in an indictment, or of a lesser degree of a single offense, implied, although the verdict was silent on the subject, that the jury found the defendant not guilty of such other offenses, or of the higher degrees of the same offense. *It was on the theory that the verdict was separate and divisible, being both a verdict of acquittal and conviction*, and that there was no inconsistency between a claim that the defendant was not guilty even of that of which he was convicted, and the claim *that the verdict still stood as an acquittal of the other matters charged in the indictment*, that the defendant was permitted on a new trial to urge the former verdict as an acquittal of all the matters charged other than that on which the conviction was had." (Emphasis supplied.)[12]

That the common law thus limited the extent of the waiver of jeopardy attached to an appeal in a criminal case is evidenced by the decisions of the courts in twenty-three

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[12] Accord, *United States ex rel. Valenti* v. *Karmuth*, 1 F. Supp. 370, 375 (N.D.N.Y. 1932); *In re Bennett*, 84 Fed. 324, 325 (N.D. Calif. 1897); Clark, Criminal Procedure, 452 (2d ed. 1918).

tioning, "he changed his story and told me that he went down the back staircase. . . ." R. 127. Sergeant Couture testified that Green stated that he did not stop at the first floor on his way to the basement. R. 100, 110. This was an important point, since Green later testified that he stopped on the first floor to telephone a friend to disregard a suicide letter which he had written and mailed several hours before. R. 142. Couture further testified that he then asked Green whether or not he had written any letters that evening, and that Green denied having done so. R. 101, 112. The questioning, in general, shows that the two detectives from the Homicide Squad were convinced that Green was responsible for the fire. On their leaving the Hospital, the Third Precinct was again requested to place a guard on Green. R. 101.

2:10 P. M.

Green was admitted to the "strong room" of D. C. General (Gallinger) Hospital at 2:10 P. M. R. 63. He had been taken from Emergency Hospital on a stretcher in the custody of a policeman. R. 58, 143. The strong room is a locked ward with a policeman on guard. R. 68, 74, 121. There are bars around the room, which contains approximately a dozen beds. R. 68.

3:00 P. M.

Warren Kelly, a fire inspector assigned to the Fire Investigations Section of the Fire Marshal's Office, and Fire Marshal Roberts questioned Green for approximately one hour in the strong room at Gallinger. R. 37, 49, 68, 72. Kelly, like Couture, emphasized that Green said that he had not stopped on the first floor on his way to the basement. R. 69. When asked by the District Attorney whether or not Green admitted writing any letters, Kelly replied that he had asked the question and received a nega-

states. Of these thirteen have never departed from the limited waiver doctrine (see Table I), five have adhered to it despite legislation designed to extend an appellant's waiver to the greater offense of which he was not convicted (see Table II), and five followed it prior to the enactment of some such statute or constitutional amendment (see Table III).

The courts in seventeen states have not commented on what the common law rule was. Of these six have remained absolutely silent on the problem (see Table IV), and eleven never inquired beyond the legislative or constitutional provisions creating a presumption of absolute waiver (see Table V).

In only eight states are there decisions indicating that waiver of jeopardy was not limited at common law; in two of these, earlier cases recognizing the common law were overruled (see Table VI).

The minority opinion in *Trono* v. *United States*, 199 U.S. 521, 540 (1905), citing a number of states which followed the limited waiver doctrine, stated that this was "the general consensus of opinion of American textbooks on criminal law[13] and the overwhelming weight of American decided cases."

This is true today. The courts of Alabama, Arkansas, California, Florida, Georgia, Illinois, Iowa, Louisiana, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Tennessee, Texas, Virginia, West Virginia and Wisconsin still hold in the absence of statute or constitutional amendment that a conviction of a lesser offense is an acquittal of the greater; that the accused, when he urges an appellate court to reverse his conviction of the lesser offense, thereby consents to be retried for that lesser offense, but that he does not waive the jeopardy he has been in on the greater. His application for a correction of the

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[13] Contemporary reaction to the majority decision was disapproving. A note in the Harvard Law Review for February 1906 stated the *Trono* case to be the first Supreme Court comment on the common law rule as to waiver of jeopardy and stated the decision was contrary to the weight of authority. 19 Harv. L. Rev. 300 (1906).

tive answer. R. 71-72. It is clear that Kelly suspected Green of arson. R. 148.

May 27, 1953

Green remained in custody in the strong room at Gallinger Hospital.

9:00 P. M.

A letter, evidently written by Green, was turned over to the police. R. 112. The text of the letter appears at R. 179-180. The letter notified a friend of Miss Brown's death and requested that flowers be purchased for her. It also included an ambiguous statement from which the prosecution sought to imply that there was a suicide pact (R. 136), but which the accused contended meant solely that Miss Brown, had she been alive, would have sympathized with his intent, subsequently changed (R. 142), to commit suicide. R. 140. The majority of the court below indicated that the questioning of the defendant prior to discovery of the letter was permissible, if for no other reason but that "the police could hardly be expected to make a murder charge on . . . suspicion alone." R. 181-182.

May 28, 1953

About 9:00 A. M.

Armed with this letter, Sergeants Couture and Clarke and Inspector Kelly questioned Green in the strong room at Gallinger. R. 78, 113. At 9:30 A. M., Sergeant Clarke noted that Green "made statement admitting writing letter." R. 130. At this interview, Green apparently told his questioners that he wrote the letter shortly after finding Miss Brown dead and mailed it at approximately 12:45 A. M. R. 129, 180. Nevertheless, Couture asserted that Green told them that he had written the letter "just prior

verdict, in other words, will not be considered as more extensive than his needs.

TABLE I

ALABAMA—*Thomas* v. *State*, 255 Ala. 632, 636, 53 So. 2d 340, 342 (1951); *Davis* v. *State*, 31 Ala. App. 508, 19 So. 2d 356 (1944).

FLORIDA—*Henderson* v. *State*, 55 So. 2d 110 (Fla. 1951); *McLeod* v. *State*, 128 Fla. 35, 174 So. 466 (1937); *State* v. *Lewis*, 118 Fla. 910, 160 So. 435 (1931); *Johnson* v. *State*, 27 Fla. 245, 271, 9 So. 208, 212 (1891).

ILLINOIS—*People* v. *Newman*, 360 Ill. 226, 195 N.E. 645 (1935); *People* v. *Carrico*, 310 Ill. 543, 545, 142 N.E. 164, 165 (1923).

MICHIGAN—*People* v. *Farrell*, 146 Mich. 264, 109 N.W. 440 (1906).

MINNESOTA—*State* v. *Lessing*, 16 Minn. 75, 80 (1870); *State* v. *Wiles*, 26 Minn. 381, 4 N.W. 615 (1880); See also Minn. Stat. Ann., § 611.10.

NEW JERSEY—*State* v. *Labato*, 7 N.J. 137, 80 A. 2d 617, 623 (1951); *State* v. *Cooper*, 13 N.J.L. 361, 25 Am. Dec. 490 (1833).

NEW MEXICO—*Ex parte Williams*, 58 N.M. 37, 43, 265 P. 2d 359, 363 (1954); *State* v. *Reed*, 39 N.M. 44, 39 P. 2d 1005 (1934); *State* v. *Welch*, 37 N.M. 549, 25 P. 2d 211 (1933); *State* v. *Pruett*, 27 N.M. 576, 203 Pac. 840 (1921).

OREGON—*State* v. *Wilson*, 172 Ore. 373, 382, 142 P. 2d 680, 683 (1943).

PENNSYLVANIA—*Commonwealth* v. *Flax*, 331 Pa. 145, 200 Atl. 632 (1938); *Commonwealth* v. *Alessio*, 313 Pa. 537, 547, 169 Atl. 764, 767 (1934).

TENNESSEE—*Reagan* v. *State*, 155 Tenn. 397, 293 S.W. 755 (1927); *State* v. *Norvell*, 2 Yerg. 24, 24 Am. Dec. 458 (Tenn. 1820).

to his detecting the odor of smoke. . . ." R. 113. Both Couture and Clarke testified that Green had said to them, in response to questioning, that "before he would let those people get the house, he would blow the so-and-so place up and then blow his brains out. . . ." R. 114, 130.

11:00 A. M.

Green was discharged from Gallinger Hospital at 11:00 A. M. R. 63. It appears that he was discharged at that particular time at the request of the police. R. 64. He was taken in police custody to the Coroner's Inquisition at the District of Columbia Morgue. R. 63; 1. The Coroner committed Green to the Washington Asylum and Jail to await Grand Jury action. R. 1.

To summarize, police interrogation of Petitioner commenced with his return to consciousness on an examining table in Emergency Hospital early on the morning of May 26, 1953, and continued there and in the strong room at the District of Columbia General Hospital for two and a half days until Petitioner was finally taken before the deputy coroner, who acted as committing magistrate. There is no evidence that at any time during this period Petitioner was advised of his rights or offered an opportunity to communicate with friends or counsel.

It appears from the majority opinion below that for the first 36 hours of this interrogation period, the police had no evidence to justify detaining the defendant on a murder charge. R. 181-182.

Assertions about the pre-arraignment questioning of the defendant during this detention were admitted in evidence against him. Some of the assertions, particularly as to the defendant's extravagant remark that he would have blown up the house and blown his own brains out before acquiescing in eviction, were offered as evidence of malice. Others

were offered to pursuade the jury that they could believe only the circumstantial evidence as to what occurred in the house before the arrival of the firemen. The prosecution, having tried this case before, was familiar with the defense, and these assertions were offered to discredit that defense before the defendant ever took the stand. They constituted an affirmative and vital part of the Government's effort to convict the defendant upon circumstantial evidence.[10]

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[10] Of the assertions made about the pre-arraignment questioning of the defendant, four may be singled out as highly prejudicial.

The first is that the defendant initially denied having written any letters. This assertion arises with respect to the interrogation of the defendant by Sergeants Couture and Clarke at 10:00 a.m. the morning of the fire. R. 101, 112, 127. It was offered by the prosecution to show that the defendant had a guilty mind. R. 151-152.

The second is that the defendant remarked he would blow up the house and blow his own brains out before acquiescing in eviction. This assertion arises with respect to the interrogation of the defendant on the third morning of his detention by Sergeants Couture and Clarke and Inspector Kelley. R. 114, 130. This assertion was offered by the prosecution to show that the defendant had a felonious intent.

The third, arising from that same interrogation, related to the time at which the defendant wrote the ambiguous letter. Two of the prosecution witnesses asserted that the defendant had told them he had written the letter just prior to smelling smoke, that is early on the morning of the fire. R. 72-73, 113. A third prosecution witness testified that the defendant had stated that he wrote the letter about midnight before the morning of the fire, that is shortly after he had discovered Miss Brown's death. R. 129. The conflict as to the time the letter was written was prejudicial to the explanation of the letter offered by the defendant, namely, that it did not express an intended suicide pact but rather his personal gloom upon discovering Miss Brown's death. R. 139-140.

The fourth arises with respect to what the defendant did not say during the pre-arrangement questioning. The prosecution's summation to the jury stressed the assertion that the defendant had never told any of his interrogators that Miss Brown had died prior to his writing the letter. R. 151-152. Actually, the defendant had told his interrogators this on the third morning (R. 129, 180), but the prosecutor chose to overlook that.

The majority below, in addition to the reasons discussed in the text above, expressed two further reasons for not excluding these assertions under the *McNabb* rule. The first such reason was that the assertions as to the interrogation of Petitioner at 10 a.m. the morning of the fire

state legislative or constitutional provisions requiring an appellant to waive the jeopardy he had been in on the greater offense when he appeals a conviction of a lesser included offense.

These decisions are no precedent for abrogating the common law rule in the Federal courts, for the restrictions *in favorem libertatis* imposed on the Federal courts by the Bill of Rights were not made wholly applicable to state governments. See, *e.g.*, *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937); *Maxwell* v. *Dow*, 176 U.S. 581 (1900); *La. ex rel. Francis* v. *Resweber*, 329 U.S. 459, 462 (1947); *Brock* v. *North Carolina*, 344 U.S. 424, 428-429 (1953).

Thus, in *Kring* v. *Missouri*, 107 U.S. 221, 225 (1882), this Court held that a state might, "either by her fundamental law or by an ordinary act of legislation," abolish the limited waiver doctrine which obtained by court decision.

ARIZONA—Ariz. Code Ann. 1939, § 44-2008.
COLORADO—Colo. Const., Art. I, § 18.
IDAHO—Idaho Code, 1947, § 19-2405.
INDIANA—Burns' Ind. Ann. Stat., §§ 9-1901, 9-1902 (Burns' 1956 Replacement).
KANSAS—Kan. Rev. Gen. Stat., 1949, § 62-1602.
KENTUCKY—Russell's Ky. Codes 1953, Cr. Prac. § 270.
MONTANA—Mont. Rev. Codes 1947, § 94-7602.
OKLAHOMA—22 Okla. Stat. Ann., § 951.
SOUTH DAKOTA—S.D. Code 1939, § 34.4001.
UTAH—Utah Code Ann. 1953, 77-38-2.
WYOMING—Wyo. Const., Art. I, § 11 (1889).

TABLE VI

The courts of the eight states listed below represent the minority view that waiver of jeopardy was not limited at common law to the offense embodied in the conviction appealed. It should be noted that of these, Vermont and Washington at one time honored the majority common law rule.

CONNECTICUT—Conn. Gen. Stat. 1949, c. 433, § 8878.

NEBRASKA—*Macomber* v. *State*, 137 Neb. 882, 291 N.W. 674 (1940); *Bohanan* v. *State*, 18 Neb. 57, 24 N.W. 390

The case presents the question whether the rule formulated in *McNabb* v. *United States*, 318 U.S. 332 (1943), is to be suspended in situations where the physical condition of the one arrested precludes his being taken before a committing magistrate. The majority below stated (R. 181):

> "There was no unlawful detention due to failure promptly to carry him before a committing magistrate. He was arraigned just as soon as the hospital authorities released him. Delay in arraigning a suspect caused by his necessary hospitalization can hardly be called illegal detention."

The dissent below of Circuit Judge Bazelon and Chief Judge Edgerton confirms the nature of the majority holding (R. 183):

> "Because appellant's injuries required his confinement in a hospital during this period, the majority holds there was no 'illegal detention' within the meaning of Rule 5(a), F.R. Crim. P., and hence the *McNabb* rule does not bar the statements."

The consequent admission at the trial of testimony prejudicial to the defendant points up the unfairness that can

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were admissible because Petitioner then "not only was not being illegally detained but was not being detained at all." R. 180-181. With the dissenters below (R. 183), Petitioner submits that interrogation either in formal custody or while fairly constantly attended by policemen is interrogation subject to the *McNabb* rule. The custody that morning was all that was necessary to restrain Petitioner, who was in his sixties, was injured, and was lying on a hospital examination table.

The second reason advanced by the majority below was that the assertions were not made with respect to a confession but were made simply to shake Petitioner's credibility as a witness. R. 178, 181. These assertions did far more than merely shake the credibility of Petitioner. They were part of the prosecution's effort to show motive and to bolster a case which depended purely on circumstantial evidence. As the dissenters below point out (R. 183), after this Court's decision in *Opper* v. *United States*, 342 U.S. 84, 91 (1954), there should be no distinction between this sort of assertion and an asserted confession.

(1885), *motion to dismiss denied*, 118 U.S. 231 (1886), *cause set aside because of escape of prisoner*, 125 U.S. 692 (1887).

Nevada—Nev. Comp. Laws 1929, § 11030.

Ohio—General Code, § 13449-4.

North Carolina—*State* v. *Matthews*, 142 N.C. 621, 55 S.E. 342 (1906) (North Carolina has no constitutional provision on double jeopardy.)

South Carolina—*State* v. *Gilles*, 73 S.C. 318, 323, 53 S.E. 487, 489 (1906).

Vermont—*State* v. *Bradley*, 67 Vt. 465, 473 (1894). *Contra: State* v. *Kittle*, 2 Tyler (Vt.) 471 (1803), *overruled in State* v. *Pianfetti*, 79 Vt. 236, 247, 65 Atl. 84, 86 (1906) (Vermont has no constitutional provision on double jeopardy).

Washington—*State* v. *Ash*, 68 Wash. 194, 122 Pac. 995 (1912), *overruling State* v. *Murphy*, 13 Wash. 229, 43 Pac. 44 (1895) (partially relying on statute).

APPENDIX B

Cases Illustrating the Application of the Trono Doctrine

Examination of the cases citing *Trono* indicates that the absolute waiver doctrine promulgated by the four Justices with whose result Mr. Justice Holmes concurred has not been regarded as the law to be applied to a case arising in the Federal courts of the United States. This Court twice avoided such an extension by drawing highly technical distinctions. *Stroud* v. *United States* and *Burton* v. *United States, infra.* No Court of Appeals, prior to the Court of Appeals below in the instant case, was faced with the problem. (Both *Stroud* and *Burton* were direct appeals from the trial courts.) One District Court has extended the *Trono* doctrine to hold that an appellant from a conviction of second degree murder waived the jeopardy he had been in on first degree. *United States* v. *Gonzales, infra.*

result when a court's inquiry on the admissibility of pre-arraignment interrogation is limited solely to determining whether or not there has been "illegal detention" in violation of Rule 5(a).

While this Court was primarily concerned in *McNabb* with whether the police had violated the Congressional command in Rule 5(a), there is no reason to suppose that this Court intended to dispense with the exclusionary rule of evidence formulated in that case where the person arrested does not happen to be well enough to be brought before a committing magistrate. In phrasing what is now known as the *McNabb* rule, the Court expressed its concern with *any* conduct of federal law officers in plain disregard of the duties enjoined upon them by Congress. See *McNabb* v. *United States*, *supra*, at 341-345.

> "For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them.
>
> * * * * *
>
> "The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon Federal law officers.
>
> * * * * *
>
> "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."

In restricting the application of the *McNabb* rule to the case where the delay is unreasonable under Rule 5(a), the

majority below ignored the fact that this Court was concerned with avoiding "all the evil implications of secret interrogation of persons accused of crime." *McNabb* v. *United States*, *supra*, at 343-344. It must be recognized that the purpose of Rule 5 is twofold: (1) the police are not to be the sole judges of the propriety of detaining arrested persons; (2) the police are not to have the opportunity to engage in prolonged interrogation of persons who have not been advised of their rights.

Otherwise expressed, the Congressional command was "designed to safeguard persons against compulsory questioning by law enforcement officers behind closed doors." Mr. Justice Black, concurring in *United States* v. *Mitker*, 350 U.S. 179, 191 (1956). This, of course, is precisely what happened here. There may have been reason for the two and one-half day delay in arraigning the defendant. But if the police were going to hold the defendant under lock and key and utilize the opportunity for interrogation in order to obtain evidence against him, a reasonable interpretation of Rule 5 would require that they first advise him of his right not to make a statement, that any statement made by him might be used against him, and that he had a right to counsel.

The anomalous result of excluding testimony concerning the statements made by a person under arrest during the period prior to his arraignment only if there has been a violation of Rule 5(a) is demonstrated by the fact that the majority of the court below approved the admission of testimony which should otherwise have been excluded under this Court's decision in *Upshaw* v. *United States*, 335 U.S. 410 (1948). For the majority below admits (R. 181-182):

> "It was not until Wednesday evening when they obtained the letter [some thirty-six hours after the de-

fendant's interrogation began] . . . that a murder charge was justified."

The majority below characterized Green's detention behind bars as "necessary hospitalization". R. 181. If so, there is serious doubt whether assertions as to statements made at this time should be permitted under any circumstances, for if the suspect is too ill to be brought before a committing magistrate, it would seem that he is too ill to make a considered statement concerning the crime. But, at any rate, it is only fair to insist that the police not proceed in "flagrant disregard of the procedure which Congress has commanded" in Rule 5(b). The significance of the warning advice prescribed by Rule 5(b) in federal criminal procedure is illustrated by *United States v. Carignan*, 342 U.S. 36 (1951), cited by the majority below at R. 182. In affirming Carignan's conviction, this Court emphasized the fact that the prisoner had been advised at his earlier arraignment of the right not to make a statement. 342 U.S. at 40.

This is a problem which has received serious consideration in England, where the courts have insisted that the police afford their prisoners cautionary advice before accepting statements made by them. See *McNabb v. United States*, *supra*, at 345 n. 9; 3 Wigmore, *Evidence* 294-298 (3d ed. 1940). As pointed out by the minority of the court below, the warning advice prescribed by Rule 5(b) is given every person under arrest by an agent of the Federal Bureau of Investigation. Hoover, *Civil Liberties and Law Enforcement*, 37 Iowa L.R. 175, 182 (1952); see *Pixley v. United States*, 220 F.2d 912, 913 (10th Cir. 1955), where the agent, unable to bring his prisoner before the Commissioner, advised him that he was not required to make a statement, that any statement he might make could be used against him and that he was entitled to an attorney.

Virginia—*Stuart* v. *Commonwealth*, 28 Grat. 950 (1877). The limited waiver rule was changed by Section 36 of Chapter 208 of Code of 1849 (Acts 1877-78, p. 279, c. 311) and afterwards reinstated by Section 4040 of Code of 1887 (now Va. Code Ann., § 19-222); see *Leigh* v. *Commonwealth*, 192 Va. 583, 591, 66 S.E. 2d 586, 591 (1951); *Taylor* v. *Commonwealth*, 186 Va. 587, 43 S.E. 2d 906 (1947).

West Virginia—*State* v. *McLane*, 126 W. Va. 219, 27 S.E. 2d 604 (1943), *reversed on jurisdictional grounds*, 38 S.E. 2d 343 (1946).

Wisconsin—*Radej* v. *State*, 152 Wisc. 503, 511, 140 N.W. 21, 23 (1913).

TABLE II

The courts in five states adhere to the limited waiver doctrine *even though* the state legislatures have provided by statute that the granting of a new trial places the parties in the same position as if no trial had been had:

Arkansas—*Hearn* v. *State*, 212 Ark. 360, 205 S.W. 2d 477 (1947); See Ark. Stat. 1947, 43-2205.

California—*In re Hess*, 45 Cal. 2d 171, 176, 288 P. 2d 5, 8 (1955); *People* v. *Krupa*, 64 Cal. App. 2d 592, 149 P. 2d 416 (1944); *People* v. *McDaniels*, 137 Cal. 192, 197, 69 Pac. 1006, 1008-1009 (1902); *compare* discussion of Cal. Pen. Code § 1180 in 36 Calif. L. Rev. 431, 435 n. 23 (1948) *with People* v. *McNeer*, 14 Cal. App. 2d 22, 30, 57 P. 2d 1018, 1021 (1936).

Iowa—*State* v. *Rhone*, 223 Iowa 1221, 275 N.W. 109 (1937); *State* v. *Coleman*, 226 Iowa 968, 976, 285 N.W. 269, 273 (1939); see Iowa Code 1931, § 13945, now Iowa Code 1946 § 787.4.

Louisiana—*State* v. *Harville*, 171 La. 256, 130 So. 348 (1930); 173 La. 660, 138 So. 435 (1931); 175 La. 458, 143 So. 373 (1932); see Dart's La. Crim. Code 1943, Arts. 515, 274.

Texas—*Tomlin* v. *State*, 155 Tex. Cr. 207, 233 S.W. 2d 303, 305 (1950); see Vernon's Code Crim. Prac. 1948, §§ 702, 759; see also *Parker* v. *State*, 22 Tex. App. 105, 108, 3 S.W. 100, 102 (1886).

TABLE III

The courts of the five states listed below recognized the limited waiver doctrine prior to the enactment of the state constitutional or legislative provisions abrogating the common law.

GEORGIA—Ga. Const., Art. I, § 2-102; see *Waller* v. *State*, 104 Ga. 505, 507 (1898).

MISSISSIPPI—Miss. Const., Art. III, § 22 (1890); see *Hurt* v. *State*, 25 Miss. 378, 59 Am. Dec. 225 (1853).

MISSOURI—Mo. Const., Art. II, § 23 (1875); see *Kring* v. *Missouri*, 107 U.S. 221 (1882); *State* v. *Ross*, 29 Mo. 32 (1859) (overruled by constitution).

NEW YORK—N.Y. Code Crim. Proc., §§ 464, 543-544; see *People* v. *Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888); *People* v. *Cignarale*, 110 N.Y. 23, 30-31, 17 N.E. 135, 142-143 (1888).

NORTH DAKOTA—N.D. Rev. Code 1943, 29-2401; see result reached in *State* v. *Noel*, 66 N.D. 676, 268 N.W. 654 (1936).

TABLE IV

Examination of the reported decisions and statutes of the following six states has failed to disclose any position on the extent of the waiver of jeopardy attached to the appeal of a conviction of an offense lesser than or different from that charged in the indictment:

DELAWARE
MAINE
MARYLAND
MASSACHUSETTS
NEW HAMPSHIRE
RHODE ISLAND

TABLE V

The courts of the eleven states listed below have not examined the extent of waiver that obtained at common law but have based their decisions simply on their respective

The remainder of this appendix describes all the cases which Shephard's Citations lists as citing *Trono*.

Trono In The Supreme Court

Thirteen Supreme Court decisions cite *Trono*. Of these, four concern cases arising in the Federal courts, three deal with cases from the state courts, and six deal with cases coming from the Philippine courts.

As outlined in the text, the prohibition against double jeopardy contained in the Fifth Amendment is not equally applicable to the federal, state and insular governments. The cases arising from state and insular courts should not, therefore, be considered a precedent for cases arising in Federal courts.

A. Cases from Federal Courts

The four cases coming up from lower Federal courts do not imply any abolition of the common law rule, under which appellant, by appealing, waived jeopardy only with respect to the degree of offense of which he had been convicted. In none of these cases was there a prior acquittal.

The two most recent decisions indicate that defendant's intent is the determining factor in weighing the propriety of a new trial after a conviction in chief has been reversed. *Sapir* v. *United States*, 348 U.S. 373 (1955); *Bryan* v. *United States*, 338 U.S. 552 (1950). If defendant's intent is to be the primary consideration, it would seem that the common law rule would most closely give force to that intent since, under that rule of limited waiver, a defendant is presumed to waive jeopardy only with respect to the offense of which he was convicted and which he appealed.

In 1919 the Court avoided extending the *Trono* decision to an analogous case arising in the Federal courts. *Stroud* v. *United States*, 251 U.S. 15, 18 (1919). The Court there upheld the propriety of a new trial for first degree murder being awarded an appellant erroneously convicted of first degree murder, even though the previous jury had recommended a sentence "without capital punishment."

The Court distinguished the case from the situation

where there had been a conviction of an offense lesser than that on which he was tried.

> "The fact that the jury may thus mitigate the punishment to imprisonment for life did not render the conviction less than one for first degree murder." 251 U.S. at p. 18.

One year after the *Trono* decision the Supreme Court again refrained from extending the *Trono* decision by distinguishing another closely analogous situation. *Burton v. United States*, 202 U.S. 344 (1906). Defendant there, a United States Senator, was indicted upon three counts—two charging he had unlawfully received money from a corporation, the third charging that he had unlawfully received money from a named individual described as an officer of the corporation. Defendant was convicted on the first two counts and acquitted as to the third. On his appeal the Supreme Court reversed and ordered a new trial. At the new trial the indictment was identical as to the first two counts but the third count was changed to allege that defendant had received money from the corporation rather than from the named individual.

When considering the propriety of this new trial on the third count the Supreme Court held that the indictments were different so that the defense of prior acquittal would not apply.

The Court said:

> "Whether that reversal, upon defendant's own writ of error, had the effect, within the principle of *Trono v. United States*, 199 U.S. 521, to take from him the benefit of his acquittal on the third count in the former case, we need not decide. It may be assumed, for the purposes of this discussion, that it did not." 202 U.S. at p. 378.

To summarize, the Court, in the thirteen years following the *Trono* decision, resorted to highly technical distinctions rather than relying on the *Trono* decision when deciding cases arising in the Federal courts. The Court has not up

to now been faced with a situation in which the common law rule as to waiver had to be decided. It has, however, taken a position that would be consistent with the common law rule.

B. Cases from State Courts

The three cases arising from state courts indicate not only that the strict common law restrictions imposed upon the Federal Government by the Bill of Rights are not made applicable to the States via the Fourteenth Amendment, but also that this Court has not been entirely satisfied with the rightness of the *Trono* decision:

> "Right-minded men, as we learn from those opinions [*Kepner* and *Trono*], could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case." *Palko v. Connecticut*, 302 U.S. 319, 323 (1937).

> "The judicial history of the Fifth Amendment in prohibiting any person from being 'subject for the same offence to be twice put in jeopardy of life or limb' serves as a good pragmatic confirmation of the compelling reasons why the original Bill of Rights was found to limit the actions of the Federal Government and not those of the States. The conflicting views expressed in *Ex parte Lange*, 18 Wall. 163; *Kepner v. United States*, 195 U.S. 100; *Trono v. United States*, 199 U.S. 521; *In re Bradley*, 318 U.S. 50, and *Wade v. Hunter*, 336 U.S. 684, indicate the subtle technical controversies to which the provision of the Fifth Amendment against double jeopardy has given rise. Implications have been found in that provision very different from the mood of fair dealing and justice which the Fourteenth Amendment exacts from a State in the prosecution of offenders. . . ." *Brock v. North Carolina*, 344 U.S. 424, 428-429 (1953).

The third state case was a *per curiam* denial of certiorari to a state court for want of a substantial federal question. *Jones v. Mississippi*, 273 U.S. 639 (1926).

C. Cases from Insular Possessions

The cases arising from the Philippines cite the *Trono* decision only as authority for Philippine procedure.

> "Section 5 of the act of Congress contains no specific requirement of a presentment or indictment by grand jury, such as is contained in the Fifth Amendment of the Constitution of the United States. And in this respect the Constitution does not, of its own force, apply to the Islands." *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914).

> "*Trono* v. *United States* needs very little comment. It declares the relation of the courts and the scheme of procedure existing in the Philippine Islands and brings the case at bar to the simple proposition, when stripped of ingenious suggestions, that an error which was made (if error was made, of which we express no opinion) at the trial in the court of first instance, and which was not repeated in the Supreme Court, is not a ground of legal complaint.' *Pendleton* v. *United States*, 216 U.S. 305, 311 (1910).

Two other opinions also note the differences between federal and Philippine procedure. *Diaz* v. *United States*, 223 U.S. 442, 445-446 (1912); *Flemister* v. *United States*, 207 U.S. 372, 374 (1907).

The other two citations of the *Trono* decision are *per curiam* opinions dismissing appeals from the Supreme Court of the Philippines for want of jurisdiction. *Beecham* v. *United States*, 223 U.S. 708 and 709 (1911).

Trono In The Courts of Appeals

Shephard's citations reveal eight cases decided by the Federal Courts of Appeals in which the *Trono* decision is cited.

Four of these cite *Trono* for the proposition that one who appeals his conviction of the principal offense charged in the indictment waives the plea of former jeopardy thereto in a new trial. *Bryan* v. *United States*, 175 F.2d 223, 229

(5th Cir. 1949); *Barkman* v. *Sanford*, 162 F.2d 592, 593 (5th Cir. 1947); *Bayless* v. *United States*, 147 F.2d 169, 170 (8th Cir. 1945); *Salta* v. *United States*, 44 F.2d 752, 753 (1st Cir. 1930).

One cites *Trono* for the proposition that one who moves for a new trial may not object to it when granted by reason of former jeopardy. *Miller* v. *United States*, 224 F.2d 561, 562 (5th Cir. 1955).

Two others cite *Trono* as an analogous authority where a court corrects an inadvertently erroneous sentence prior to the commencement of service of that sentence. *United States* v. *Bozza*, 155 F.2d 592, 595 (3d Cir. 1946); *Rowley* v. *Welch*, 72 U.S. App. D.C. 354, 356, 114 F.2d 499 (1940).

The eighth case came up from Puerto Rico. The first circuit followed the *Trono* decision in holding that an acquittal of murder in an insular court arising from a conviction of manslaughter following an indictment for murder could not be used by the successful appellant to bar a new trial on that indictment for murder. *Carbonell* v. *People of Porto Rico*, 27 F.2d 253 (1st Cir. 1928).[14] The Congressional Code for Puerto Rico specifically abolished the common law rule of limited waiver of jeopardy. As pointed out above, this case does not stand as authority for the treatment of persons by the Federal courts in the United States.

Trono In The District Courts

Shephard reveals two district court opinions citing *Trono*. In one of these *Trono* is cited simply for the proposition that double jeopardy may be waived. *United States* v. *Gill*, 55 F.2d 399, 400 (D. N.M. 1931). The other case is the sole

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[14] Where territorial courts have been primarily concerned with persons brought up in the common law heritage, the Constitution has followed the flag. *United States* v. *Owens*, 2 Alaska 480 (3d Div. 1905). Editorial comment on this case stated: "In connection with this decision it should be noted that it was by the territorial court, and consequently must be considered as, in effect, overruled by the decision in *Trono* v. *United States*, *supra*." 22 L.R.A. (N.S.) 959, 961 (1909). Where the prior system of law had not contained the procedural safeguards of the Anglo-Saxon system, there is no question of the applicability of *Trono*.

example of a Federal court extending the application of the *Trono* decision to a case arising in the United States federal system. *United States* v. *Gonzales*, 206 Fed. 239 (W.D. Wash. 1913).

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